United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6096

76-6096

To be argued by
LEONARD GREENWALD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

- -x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., :

Defendants-Appellees, :

-and- :

COUNCIL OF SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA, AFL-CIO, et al., :

Intervenors-Appellants, :

-and- :

COMMUNITY SCHOOL BOARD, DISTRICT 26, :

Intervenors-Appellants. :

- -x

AND

- -x

UNITED STATES OF AMERICA, :

Petitioner-Appellee, :

-against- :

SOLOMON DEREWETZKY, et al., :

Respondents-Appellants. :

- -x

REPLY BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFSA, AFL-CIO, et al.

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orig.

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REPLY BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, AFSA, AFL-CIO, et al.

ARGUMENT

I

In reply to the Government's brief at Point I:

The Government is in error wherein it states that CSA did not comply with the District Court's direction that "individual principals be joined as party intervenors." (Government's brief at p. 9). The District Court required that the officers of CSA (who are also school supervisors or administrators) be joined, not that the hundreds of individual members of CSA be joined. The relevant portion of the transcript reads as follows:

> THE COURT: Why don't you sue using the Council name by so and so as officers and individuals?
>
> [intervening colloquy]
>
> THE COURT: Make it Council of Supervisors by their officers, so and so as officers and individually.
>
> MR. GREENWALD: Well, with the Court's permission I would so move.
>
> THE COURT: All right. . . .
>
> [intervening colloquy]
>
> THE COURT: . . . we will treat it [CSA intervention] primarily as an action by themselves as individuals.
>
> But you can have the Council in the title as descriptive of those individuals who are here.

So you will amend your title in that respect.

MR. GREENWALD: By the officers and individuals as officers of CSA.

(A - 236-237).

In adopting the position that CSA was being directed to include its members individually, the Government misunderstands the District Judge's statements as set forth above.

We have consistently followed the direction of the District Court by including the officers -- who are also supervisory and administrative personnel (see A-236) in the title of this action. We have consistently described our interest as particularized in those individual officers (particularly through Vice-President and school principal Dr. Howard Hurwitz) since the Court directed us to do so. Therefore, we properly overcame any technical deficiency which might have been of concern to the District Court at the outset of our intervention in this matter.

The District Court is of the opinion that the intervention of CSA by its officers is "primarily an action by themselves as individuals." (A-237). We have not taken issue with this position in our appeal, because allegations of particular harm to individuals are necessary to insure CSA's standing to intervene. However, we view the vigorous participation of CSA in this action as crucial to the effective advocacy of the rights of those directly affected by the permanent injunction of the

District Court (A-214). CSA's participation in this action also avoids the eventuality of a multiplicity of law suits arising from the hundreds of school supervisors and administrators who rely upon CSA to represent them in this litigation (in this regard, see United Federation of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462 (1969) at 470-1).

The Government, however, does not merely assert that CSA did not follow the direction of the District Court concerning the amendment of the title of its intervention. The Government seems to take the position that CSA has neither capacity, nor standing, to intervene in the District Court action.

As concerns "capacity" to intervene, the Government contends that CSA, as a New York unincorporated assocation, can maintain a suit only in situations in which "all the associates may maintain such an action . . . by reason of their interest jointly or in common . . ." (§12 of the General Associations Law of New York, McKinney's, 1942). The Government takes the position that this intervention in Federal Court is controlled by Section 12 of the GAL, supra. Therefore, the argument is that since "CSA's members, as members per se, rather than as school . . . officials, are not affected by the permanent injunction, they do not have the requisite interest, either jointly or in common. . . ." (Government's brief at p. 9).

We respond that (a) the capacity of CSA to intervene in this instance is not controlled by any requirement of Section 12

of the GAL, and (b) nevertheless, the intervention here is in conformity with the relevant portion of Section 12 in that Section 12 parallels the Federal requirement for standing of unincorporated associations to sue.

The capacity of CSA to intervene here is controlled by 28 U.S.C. Rule 17(b)(1). Rule 17(b)(1), which establishes the general capacity requirements to be met by would-be litigants in Federal courts, states inter alia:

> . . . a partnership or other unincorporated association, which has no such capacity [to sue or be sued as such] by the law of such [domiciliary] state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. [emphasis added] (28 U.S.C. Rule 17(b)(1).

CSA has intervened in the District Court to enforce substantive rights of its members under the Constitution. CSA is advocating rights secured by various provisions of the Bill of Rights. Thus, CSA is itself a proper party to this action under Rule 17(b)(1). The Government offers no citations in support of its argument against the capacity of CSA to intervene. We submit that recent decisions of the United States Supreme Court and several Circuit Courts of Appeal apply the language of Rule 17(b)(1) to support the capacity of unincorporated associations -- as parties -- to sue or be sued in Federal Court in order to enforce substantive rights of their members.

In Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197 (1974),

the Supreme Court applied the principles developed in such landmark decisions as NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163 (1958); National Motor Freight Ass'n v. U. S., 372 U.S. 246, S.Ct. (1963); and Hart v. Cohen, 392 U.S. 83, 88 S.Ct. 1942 (1968), to a situation involving several New York unincorporated associations. In Warth, a group of realty associations, housing, and civil rights groups in the Rochester, New York area sued in Federal Court to strike down a restrictive zoning ordinance in a Rochester suburb which foreclosed the possibility of low-income housing being located there. The Court found that the associations had not particularized any specific harm to themselves or their members. However, the Court enunciated the general proposition that:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. E.g., National Motor Freight Ass'n v. United States, 372 U.S. 246 (1963). . . . (422 U.S. at 511).

This proposition has been applied to situations involving suits by public employee unions in Council No. 34, American Federation of State, County, and Municipal Employees, AFL-CIO, et al. v. Ogilvie, et al. (7th Circ. 1972), 465 F.2d 221; and United Federation of Postal Clerks, et al. v. Watson (D.C. Circ. 1969) 409 F.2d 462.

In Council No. 34, supra, an unincorporated association representing certain upper-echelon Illinois public employees, and

an individual "as its representative" brought an action under 42 U.S.C. §§1981, 1982 and 1983 to enjoin enforcement of a State financial disclosure rule which plaintiffs believed adversely affected the Constitutional right of privacy of its members. A chief issue before the Circuit Court was "[w]hether the plaintiffs, as an unincorporated association, have the capacity to maintain this suit . . ." (465 F.2d at 223). An unincorporated association in Illinois "is precluded from maintaining an action in its own name." (465 F.2d at 223). Applying the relevant portion of Rule 17(b)(1), supra, the Circuit Court held that:

> Thus, Rule 17(b)(1) has enabled a partnership or other unincorporated association to sue or be sued in a number of suits involving constitutional rights where state law inhibits the capacity of such litigants. Todd v. Joint Apprenticeship Committee of Steelworkers of Chicago, 223 F. Supp 12 (D.C. Ill., 1963); . . . International Longshoremen's & Warehouseman's Union v. Ackerman, 82 F. Supp. 65 (D.C. Haw., 1948); United Electrical, Radio and Machine Workers of America, CIO v. Baldwin, 67 F. Supp. 235 (D.C. Conn., 1946). Even if the law of Illinois does not allow suits against or for unincorporated associations, because the plaintiff seeks to enforce a substantive right created by the Fourth Amendment of the Constitution, Rule 17(b) would appear to be satisfied. We hold that plaintiff Union has capacity to maintain this suit. (465 F.2d at 224).

Therefore, in Council No. 34, the Court held that an employee association has the capacity to represent the Constitutional interests of its employees as employees, not merely as members of the association in question.

Similarly, in United Federation of Postal Clerks, AFL-CIO v. Watson, supra, the employee association sued the Postmaster General to overturn his interpretation of work schedule and overtime provisions of a Federal employee salary law. In upholding the capacity and standing of the Federation to bring the suit, the Circuit Court observed that "[T]he courts have come increasingly to recognize the standing of associations to raise in some circumstances the rights of their members." (409 F.2d at 469). The Court further stated that

> [T]he appellant Federation is recognized by the Post Office Department as the exclusive representative of Departmental employees. It is charged with representing the interests of all postal employees without discrimination. . . . There is no reason to doubt that, as regards the matter at bar, it fully and effectively represents the interests of at least large numbers of its members (409 F.2d at 470).

United Federation stands four-square for the right of an employee organization to carry out its chief responsibility -- that of protecting the interests of its members to the greatest extent possible.

The intervention of CSA presents this Court with a situation echoing those outlined above. Here, an unincorporated employee association, which is the recognized sole bargaining agent for its members, has sought to advocate certain Constitutional rights of its members. This threat to these rights arises from actions directed toward the members as employees. Therefore, the principle of Warth, as applied through Council No. 34 and

United Federation establishes that CSA has the requisite capacity to intervene in the action in District Court pursuant to Rule 17(b)(1) of the Federal Rules of Civil Procedure.

The Government's second point is that CSA does not have standing in the action in District Court (Government's brief at p. 9) for the same general reason as that asserted in its capacity argument. The Government takes the view that since CSA's members are not affected as members by the requirement to report racial and ethnic data, their interests are divergent from those of CSA. Thus, the Government would have us believe, CSA is attempting to maintain a jus tertii proceeding which is prohibited by the "case or controversy" requirement of Article III of the Constitution (see Government's brief at pp. 9 and 10).

We respond that (a) the argument and citations of authority set forth in our reply to the Government's capacity argument above, clearly establish that in "proper cases," an unincorporated employee association may vindicate its members rights as employees, and (b) that in this particular instance CSA has standing which satisfies the case or controversy requirement, and which thereby presents the Court with a "proper" case. We have no argument with the Government's statement concerning the principle of jus tertii, but merely propose that it is not applicable to CSA's intervention.

The line of authority cited hereinabove, also addresses itself to 'standing' of unincorporated associations. This is not surprising, since the finding of capacity of a litigant to

sue, places the court's reasoning at the threshold of the case or controversey requirement. We are required to demonstrate to the Court:

> That the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor . . . (Flast v. Cohen, 392 U.S. 83, at 106).

Warth v. Seldin, supra, provides a guide to the tests to be met by an association in establishing its standing as a suitable adversary party. In its opinion, the Supreme Court establishes that:

> The association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . So long as this care be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to the proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. (422 U.S. at 511).

In this regard, Warth follows the authority of Sierra Club v. Morton, Secretary of the Interior, et al., 405 U.S. 727, S.Ct. (1971), in which the Supreme Court found that the Sierra Club did not have standing to maintain a suit to restrain a skiing resort development in Sequoia National Forest. There, the Court found that "[T]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development." (405 U.S. at 727).

Moreover, the two Circuit Court cases cited above -- Council No. 34 and United Federation -- both contain standing language. In Council No. 34, which presents the fact situation most directly related to that before this Court, the Circuit Court found:

> There has been no individualized injury alleged with respect to any member of the plaintiff Union . . . nor has the plaintiff Union alleged in what form that injury, economic or otherwise, might occur in the future to the state employees. (465 F.2d at 226).

Applying the tests set forth by the Supreme Court in Warth, we submit that: (1) CSA has alleged that its members, particularly its Vice-President -- Dr. Howard Hurwitz -- are suffering immediate injury as a result of the unconstitutional demand of the Government for racial and ethnic data. This immediate injury was set forth by CSA ab initio.

In the affidavit of Peter S. O'Brien in support of CSA's original Order to Show Cause to intervene, at paragraph 9 (A-223), O'Brien asserted:

> The supervisory employees represented by CSA claim a substantial, direct and legally protective interest in the aforementioned proceedings -- namely, the right to refuse to identify themselves as being of any race, color, or origin, which right is guaranteed by . . . the United States Constitution (A-223).

It should further be noted that the CSA intervention occurred after the District Court issued a permanent injunction directed

at the members of CSA, requiring them to submit the offending data.

(2) The alleged injuries to various members of CSA would clearly be justiciable on behalf of those individuals as intervenors. In fact, in this case we need not speak in hypotheticals, for the instant action is a consolidation (by Order of the District Court of June 15, 1976 - see A-2) of U. S. v. Board of Education, et al., and U. S. v. Solomon Derewetzky, et al. This consolidation occurred on the same day that CSA's Order to Show Cause to intervene was heard (see A-2). U.S. v. Solomon Derewetzky, et al. involved one hundred and thirty-four school principal members of CSA who were sued in their individual capacity for failure to obey the District Court's permanent injunction of May 27, 1976 (A-214). At present (August 8, 1976), one of these individuals, Dr. Howard Hurwitz, is in contempt of the Order of May 27th. Dr. Howard Hurwitz is also one of the named officers in the amended title of CSA's intervention, and has been represented by CSA's counsel throughout the contempt proceedings (see A-355, et seq.).

(3) The individual participation of each member here is not required for the proper resolution of this cause. We have consistently maintained that the Government's enforcement scheme is unconstitutional in its structure and application to the group of individual school administrators and supervisors who compromise the membership of CSA. This application has resulted in a mass

contempt of court petition against over one hundred of CSA's members. These individual injuries are the result of a policy determination by the Government, and can best be dealt with in one action which questions that policy.

In conclusion, we ask this honorable Court to sustain the intervention of CSA as an unincorporated association due to the fact that the relevant statutory authority and precedents buttresses the entirely proper action of the District Court in its decision to grant CSA, by its officers, intervention as of right.

II

In reply to the Government's brief at Point II.

The Government maintains the position that the Fifth Amendment issues met by the Report of the Magistrate (A-376) are not justiciable because they were not properly raised below. (Government's brief at p. 12). The Government relates that:

> Upon the Government's exception the District Court declined to adopt that portion of the Magistrate's Report and recommendations on the grounds that the determination of the issue would have to await assertion of the privilege by a particular person. (Government's brief at p. 13).

The District Court determined, as part of its final judgment, that the Fifth Amendment issues are "not ripe" for adjudication (A-396). Therefore, it is incumbent upon this Court to pass upon the issue of ripeness.

We maintained that the Government and the District Court misapprehended the requirements for ripeness of a Fifth Amendment claim of privilege against self-incrimination. More importantly, we maintain that the Government and the District Court have failed to grasp the Fifth Amendment due process issue presented by the Report of the Magistrate.

Our arguments concerning ripeness of the Fifth Amendment privilege against self-incrimination issue have previously been set forth. As stated in our brief at pp. 33-34 we rely upon the language of Albertson v. SACB, 382 U.S. 70 (1965) in

that regard. But, we feel that the Government's brief at Point II confuses our arguments concerning the ripeness of the due process issue. The Government has chosen to ignore the exhaustive treatment of Hannah v. Larche, 363 U.S. 420 (1959), Jenkins v. McKeithen, 395 U.S. 411 (1968) and the constellation of cases around them, provided in our brief at pp. 21-27, and 31-32.

We have no argument with the Government's exposition of the basic principles of "ripeness" as set forth in its brief at pp. 13-15. We do not feel the present situation falls within the proscribed area there set forth. However, by addressing itself entirely to the ripeness of the issue concerning the privilege against self-incrimination, the Government would have this Court ignore a basic thrust of the Fifth Amendment findings of the Report of the Magistrate as amplified in our brief. The Fifth Amendment due process i-sue is presented in the final paragraph of the Report of the Magistrate (A-386). There, the Magistrate finds that, due to the adjudicative aspects of the investigatory scheme being maintained by the Government here,

> "The persons burdened with reporting are potential targets of these complaints and they should therefore, be permitted, if they wish, to object to being required to report on their own observations." [emphasis added] (A-386).

As shown in our brief at Point I, the objection to a requirement set forth as part of an administrative regulatory scheme has been historically characterized as an invocation of due process

guarantees. Relying upon the authority set forth in our brief at Point I,

> We posit that the Due Process issues raised by the cases cited . . . carefully compared and related to the concrete circumstances now before this Court present a justiciable controversy which is characterized by (a) present coercion of individuals by government authority, (b) resistance to said coercion as improperly based upon inter alia, Fifth Amendment guarantees, and (c) recognition by the Courts that the Fifth Amendment does operate in this area of government-citizen conflicts. (brief of appellant CSA at p. 31).

We submit that the due process issue presented by the Report of the Magistrate goes to the heart of the controversy between the Government and the New York City school principals. The fact that the issue was only raised by the Magistrate at a point late in the District Court's deliberations is unfortunate. However, we feel that viewed in the context of such cases as California v. Byers, 402 U.S. 424 (1971); Hannah v. Larche, supra; and Jenkins v. McKeithen, supra, the instant controversey attains sharp and clearly defined boundries.

Therefore, although this issue did not enter into the deliberation of this cause at the normal time or in the normal manner, it nevertheless is properly before the District Court, and should be heard in order that the matter may be thoroughly resolved by the Courts.

III

In reply to the Government's brief at Point III

As was set forth in our reply to the Government's Point II above, the Magistrate's Report sets out a Fifth Amendment due process as well as privilege issue. In Appellant CSA's brief, we set forth the conclusion that the Report, and our elaboration of it at Point I

> posit two interrelated but separately identifiable issues for the District Court to hear. The due process clause has clear application to administrative adjudicative investigations. Furthermore, the privilege against self-incrimination becomes operative once possibly incriminating information is coerced in violation of the due process clause. (Appellant-intervenor CSA's brief at p. 34)

The Government, at Point III, once again fails to discuss the due process elements of the Report of the Magistrate. The Government treats the balance of the authority cited by CSA in our brief only from the point of view of the privilege against self-incrimination.

As relates to the privilege against self-incrimination, the Government would have this Court adopt the position that "the remoteness of the likelihood of prosecution is further increased by the fact that the identity of the person providing the information is not disclosed except in the instance of the person who executes a certification." (Government's brief at p. 18) The

basic point of this entire controversy revolves around the fact that the Government is forcing certain school supervisors and administrators to certify racial and ethnic information. The members of intervenor-appellant CSA are the exception to the general rule that "nobody will know" who the individuals involved in possible deprivations of civil rights are. The Government is arguing that there are only a few exceptions to the general protection of anonymity afforded by the reporting system. That does not meet the Constitutional objections of those few exceptions--namely, the members of CSA.

The Government further submits that the "information sought here. . . is. . . of a neutral, non-incriminating nature." (Government's brief at p. 19) We reply that such an assertion ignores the context in which the information is being sought. In the very next phrase, the Government would buttress this conclusion by observing that this information is required "to assure that the deprivation of the civil rights of any person by a recipient of federal financial assistance is not occurring." (Government's brief at p. 19) This is bootstrapping. This 'neutral' information is being gathered as part of an administrative adjudicatory investigation. Under the authority of Marchetti v. U.S., 390 U.S. 62 (1968); Albertson v. SACB, 302 U.S. 70 (1965); and California v. Byers, supra, these "compelled disclosures" placed

the school officials involved under "substantial hazards of self-incrimination". It should not be forgotten that this entire investigation is the result of specific unrevealed complaints of discrimination against unnamed sectors and individuals of the New York City Public School System.

The Government places great importance on the authority of Heligman v. United States, 407 F2d 448 (8th Cir. 1969), cert. denied, 395 U.S. 977 (1969), and United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944). We respectfully submit that these cases are not relevant to the issue of the privilege against self-incrimination (or rights to due process) here involved. Both cases involve officers of organizations who had refused to produce organization records on grounds of the claim of Fifth Amendment privilege. The Supreme Court quite properly held that the information went to the corporate or associational interest which is not protected by the Fifth Amendment privilege. However, here we are faced with the requirement that individuals come forth not with records, but with their own subjective observational interpretation of the racial and ethnic identity of their compatriots and themselves. This data collection is in response to specific complaints of discrimination. The basic point of the Fifth Amendment privilege is to ensure that a citizen cannot be convicted "out of his own mouth".

The demand for information requires the citizen to run a substantial risk of doing exactly that.

Finally, the Government alleges that the instant carrying out of an important governmental mandate (which we concede) cannot be thwarted and rendered "impossible" by the objections of those who are being required to report. We have consistently presented the Government with alternative methods of gaining the relevant data. The basic import of our position is that there is no requirement -- statutory or otherwise -- that the principals of public schools must provide the subjective and impressionistic answers to the EEO-5 form and Special Compliance questionnaire. In this regard, we return to the Government's discussion of Heliq-man v. U.S., supra. In its quotation from the Supreme Court's opinion (Government's brief at p. 23), the following passage is included:

> it is difficult for us to perceive how the defendant can seriously advance his claim [of privilege] when he could easily have had some other corporate officer sign the return and file it. . .
> (407 F2d at 451-52)

It is just as difficult for us to perceive how the Government can, under the Constitution, force specified individuals to reveal possibly incriminating information, when the Government can obviously employ innumerable other methods and individuals to gather the required data.

In conclusion, we submit that the situation here presents the individual school supervisors and administrators with a "Hobson's choice" which ripens their privilege against self-incrimination, even though particular individuals have not invoked the privilege. In this regard, we continue to rely upon Albertson v. SACB, supra, as elucidated in our brief at page 33.

Furthermore, we resubmit that the arguments presented by the Government in its Point III serve only to buttress our stated position that the administrative adjudicatory investigative scheme, as here employed, violates the Fifth Amendment right of due process.

IV

In reply to the Government's brief at Point IV:

In arguing that the reporting on the ethnicity of student and faculty populations or that the racial self-labeling of individual school principals constitutes no invasion of privacy since such information is no more private or personal than other readily disclosed characteristics such as name or occupation (Government's brief at p. 27), the Government (and District Court, A-381-383) misapprehends the thrust of Intervenors' objections. Our complaints are directed, in the first instance, at the Government's ill-conceived, irrational, and unscientific "racial" classifications of individuals which, in the second instance, are compelled to be donned, under penalty of fines and imprisonment, by school principals and, through them, forced to be worn by faculty and students as well.

Without addressing the admitted arbitrariness of the bureaucracy's efforts to segregate, catalog, and differentiate among the peoples of the United States (see A-19 and Addendum to CSA's brief at p. 56), the Government apparently contends that the policies sought to be furthered through the enforcement of civil rights laws should override the objections of school principals aimed at the means by which those goals are achieved. We perceive a blindness in that view, which, if followed, would thoughtlessly aggravate an already intolerable victimization of people along "racial" and other irrelevant lines.

We previously argued that "race" or "ethnicity" as those terms are popularly used are oftentimes incapable of definition. We suggested, moreover, that subjective delineations of populations along racial lines needlessly incite the worst traditions of racism and ethnic hatred unfortunately brandished upon the history of this country. The problem of inexactitude in the murky science of human physical typology (magnified by the careless approach to the reporting process condoned by the Government) necessarily begs the question: if the information sought is unreliable, if not irrelevant, why bother to get it? (More importantly, why should people who refuse to supply such worthless data be punished?)

We are in agreement with the views of recent commentators who thoughtfully confronted the question of the utility of "racial" data to decision makers in social policy planning:

> "Groups which are to be defined at least in part by ancestry present a special difficulty because it is difficult to conceive of a rational purpose for seeking the definition. The "races" of mankind, for example, are apparently understood to be groups which are directly descended from different historical ancestors and which have had no relation to one another since the time of those ancestors. The choice of the historical ancestors has to be arbitrary, as does the classification of individuals produced by the intermarriage of members of different races, unless we know the reason for needing to make the classification. About the only purpose for which

> it may still be relevant to speak about races in terms of common ancestry is to predict the occurrence of a particular genetic trait in an individual; and it is doubtful that even those groups found to carry a given trait would correspond with the three to five "races" of mankind commonly thought to exist. Since it is not clear what other purpose or purposes are served by the cultural practice of dividing mankind into a handful of "races," it is impossible to ascertain what the cultural definition of a race is, i.e., what hard facts distinguish one race from another in common usage. Unlike the definition of a sex, which utilizes a physical characteristic relevant to a specific biological motive, i.e., reproduction, the definition of a race corresponds to no specific facts because it is relevant to no clearly ascertainable motive accompanying the use of racial terms."
>
> "The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making", 9 San Diego L. Rev. 190 (1972).

Our modern world history, however, is not without examples of efforts by governments to classify their populations and, having "succeeded" in that objective, plan social and political programs.

> "The Union of South Africa, the states of the South during the era of Jim Crow, and Nazi Germany provide examples of attempts at racial and ethnic definitions, and surely the individuals in those countries and states had a great deal at stake in how those definitions were made. Significantly, with the possible exception of South Africa, genetics were thought to provide the rationale for using racial and ethnic criteria in allocating benefits and burdens and restricting freedom."
>
> 9 San Diego L. Rev. 190, 202, footnote 10.*

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*It is the authors' thesis that individual merit, not group ancestral identification, is the only valid basis for social and political decision-making. They conclude that justice to the individual is the only true form of justice. 9 San Diego L. Rev. 190, 262, 263. We agree.

The Governmental intrusion into the privacy of one's beliefs and consciousness, which in many instances is not manifested in apparent physical features, is not, as the Government suggests, equal to signifying a name or occupation. An individual's sense of himself as a being,oftentimes cannot be translated into rigid, arbitrary, and popular conceptions of ancestral, physical, or ethnic origin. The modern world has borne repeated witness to the brutality of ill-conceived selections by individuals of unpopular "racial" categories or the involuntary classification of individuals by others on the basis of the category thought to apply.

Remarkably, the Government's citation of authority for the coerced acquisition of racial data in individual school populations -- which clearly condones such gathering -- is wholly at odds and inconsistent with another statutory provision governing other similar data collection activities. The decennial census which, nearly since its inception, has gathered, tabulated, and analyzed racial, among other data concerning the American population and furnished statistics for program planning, no longer automatically does so. Title VIII of the Civil Rights Act of 1964 (42 U.S.C. §2000f) provides that ". . . a count of persons of voting age by race, color, and national origin . . . shall be collected and compiled in connection with the Nineteenth Decennial

Census, and at such other times as the Congress may prescribe. . . Provided, however, That no person shall be compelled to disclose his race, color, national origin . . . nor shall any penalty be imposed for his failure or refusal to make such disclosure. Every person interrogated orally, by written survey or questionnaire or by any other means with respect to such information shall be fully advised with respect to his right to fail or refuse to furnish such information."

Senator Dirksen (of Illinois), speaking of the reason for the inclusion of the proviso in §2000f, gave the following analysis:

> "I do not find Title VIII relating to the gathering of registration and voting statutes objectionable except that we should protect the privacy of those who do not wish to give information as to race, color, and national origin and the like to survey groups or investigators. So I would suggest that we provide that it shall not be an offense not to give such information to the Commission [on Civil Rights]." U.S. Congress, Congressional Record, March 26, 1964, p.6451. (emphasis added)

We submit that school principals are entitled to a part of the shield of that right of privacy. The protection sought, moreover, is not without regard to or inconsistent with the Governmental interest in the information aspired to. Indeed, the Government maintains* that principals need not directly furnish racial information about themselves or those around them.** (Government's brief at p. 6,footnote 10; p.27)

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* and **. See next page.

If the Government now concedes that principals who object to racial reporting and self-labeling need not now participate in that survey, then the dilemma of protesting principals would seem at an end. Other persons, who do not object to such reporting or self-labeling, could provide the identical information sought. And a clearly less drastic means of achieving the Governmental objective would seem to be had.

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*But only after coercive assaults against school principals for contempt for refusing to furnish racial information.

**The Government's brief indicates that "The only persons who are identified by name, ethnicity and race are those principals who voluntarily choose to execute the required certifications." (Government's brief at p. 27) (emphasis added) Since execution of the certification (See A-70, A-25, and A-33) requires an attestation to the accuracy of information contained in the Special Compliance Report and EEO-5 form, and since it follows that if a principal "voluntarily chooses" not to execute the certification, another person making the certification must necessarily directly conduct or at least supervise the gathering in order to make the attestation, the principal need not participate at all.

CONCLUSION

Appellants-Intervenors respectfully request that this honorable Court find that:

1. Part VI of the Magistrate's Report is ripe for decision, in that there is a justiciable issue arising from the fact that school supervisory personnel are being required to produce involuntarily possible incriminating information concerning the racial composition of their school populations without the benefit of due process and the right to invoke the privilege against self-incrimination; and that

2. School supervisory personnel may claim a constitutional right of privacy against involuntary disclosure of personal racial and ethnic characteristics as well as information concerning the racial and ethnic composition of pedagogical and student populations,

for the considerations and pursuant to the authority set forth hereinabove.

Dated: New York, New York
August 9, 1976

Respectfully submitted,

FRANKLE & GREENWALD

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